STATE OF MICHIGAN

COURT OF APPEALS

IRENE WARBER,

Plaintiff-Appellant,

v

TRINITY HEALTH CORPORATION,

Defendant-Appellee.

UNPUBLISHED
August 21, 2003

No. 239665
Muskegon Circuit Court
LC No. 01-040761-NO

Before: Zahra, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was walking into an aquatherapy center for treatment when she apparently tripped on a ledge created where the concrete entrance walk meets a concrete pad and fell causing injury. At her deposition, plaintiff stated that before her fall she was looking straight ahead and attributed her fall only to the existence of the ledge. The parties presented evidence that the ledge was between ¾ and 3 ½ inch high. Plaintiff alleges that the ledge was a lower height because "it would be more dangerous than a tall one, since the shorter ledge still can be a trip hazard, yet will not be easily seen." Plaintiff also alleges that the sidewalk is deeply shaded by vegetation alongside the sidewalk and the second floor which hangs over one side of the sidewalk. Further, plaintiff alleges that the concrete sections comprising the ledge consisted of the same dark color making the ledge difficult to see. Plaintiff admits that the front of the ledge had been painted, but asserts that the paint was barely visible at the time of the incident.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Id.* Summary disposition may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

Generally, whether a danger is open and obvious depends upon whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882, (1995), citing *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, "steps and differing floor levels [are] not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-615; 537 NW2d 185 (1995) (emphasis in original).

The present case alleges a condition similar to those in *Maurer v Oakland Co Parks & Recreation Dep't*, one of the two consolidated cases decided by the Supreme Court in *Bertrand, supra* and *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). In *Maurer*, the plaintiff stumbled and fell on an 'unmarked cement step' as she was leaving a rest room area at a park. *Bertrand*, *supra* at 618. In *Lugo*, the plaintiff "was walking through a parking lot . . . when she apparently stepped in a pothole and fell." *Lugo, supra* at 514. The plaintiff in *Maurer* testified at her deposition that she "just didn't see the step there." *Bertrand, supra* at 619. In *Lugo*, the plaintiff "testified at her deposition that she was not watching the ground and that she was concentrating on a truck in the parking lot at the time." *Lugo, supra* at 514-515. Similar to the plaintiffs in *Maurer* and *Lugo*, plaintiff in the present case tripped over the ledge because she did not see it. More importantly, "[t]he *Bertrand* Court held that the defendant in *Maurer* was entitled to summary disposition on the basis of the open and obvious danger doctrine because the plaintiff had shown nothing unusual about the step." *Id*., at 521, citing *Bertrand, supra* at 619. Further, in *Lugo*, the Court found that the plaintiff could not avoid the open and obvious danger doctrine because she tripped on a common pothole. *Id*., at 522-523. Here, viewing the evidence in light most favorable to plaintiff, the condition alleged in the present case is an open and obvious condition substantially similar to those addressed in *Maurer* and *Lugo*. Further, the condition alleged by plaintiff is accurately considered either an "unmarked step" or a "different floor level," depending on the accepted height between ¾ and 3 ½ inch high. *Bertrand, supra* at 614.

To avoid the open and obvious danger doctrine, plaintiff argues that a combination of the ledge's low height, deep shading around the area and a lack of color contrast between the concrete slabs present unique circumstances that make the ledge unreasonably dangerous. However, plaintiff has shown nothing unusual about the ledge. The ledge's height is not unusual considering that steps and differing floor levels alone are not ordinarily actionable. *Bertrand, supra* at 614. Moreover, shady sidewalks that have consistent color concrete are common. See *Lugo, supra* at 522 (dismissing plaintiff's claim that vehicles in the parking lot distracted her because there is nothing "unusual" about vehicles being driven in a parking lot). Accordingly, plaintiff has not alleged unusual factors that remove this case from the open and obvious danger doctrine.

Since the ledge was an open and obvious condition, plaintiff must show "special aspects" of the condition make it unreasonably dangerous. *Lugo, supra* at 517. Special aspects are those that " give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . . ." *Id*., at 519. Further, "the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an

unreasonable risk of harm, i.e., whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability." *Id*., at 517-518.

Considering that the alleged condition is a typical and common condition without unusual circumstances, plaintiff has failed to show that there is an uniquely high likelihood of harm. Further, plaintiff has failed to show that condition give rises to a severity of harm if the risk is not avoided. See *Lugo*, *supra* at 518 (truly special aspect giving rise to severity of harm illustrated as unguarded thirty foot deep pit in the middle of a parking lot). Accordingly, in light of plaintiff's failure to show special aspects of the ledge at issue, the condition did not pose an unreasonable risk of harm.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens